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Supreme Court, U.S.
FILED

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No. _____

In The
SUPREME COURT OF THE UNITED STATES

STEPHEN DAVID,
Petitioner

V.

TIMOTHY HALL,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether 28 U.S.C. § 2244(d)(1)'s one-year period of limitation for habeas corpus petitions contains a statutory exception for cases where the prisoner can make a colorable showing of actual innocence.

2. If 28 U.S.C. § 2244(d)(1) does not contain an actual-innocence exception, whether the one-year period of limitation violates the Suspension Clause of the United States Constitution when applied to cases where the prisoner can make a colorable showing of actual innocence.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit (App., *infra*, A2-11) is reported at 318 F.3d 343. The opinion of the United States District Court for the District of Massachusetts (App., *infra*, A12-16) is unreported. The report and recommendation of the United States Magistrate Judge (App., infra, A17-30) is unreported.

JURISDICTION

The court of appeals entered its judgment on February 5, 2003. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

THE STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

28 U.S.C. § 2244(d)(1) provides, in relevant part, that "[a] 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from. . . the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review."

Article I, Section 9 of the United States Constitution provides, in relevant part, that "[t]he privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."

STATEMENT OF THE CASE

On December 20, 1990, a grand jury sitting in Norfolk County, Massachusetts, returned three indictments against the petitioner alleging murder, kidnapping, and armed robbery. On April 13, 1992, he offered to change his plea to so much of the murder indictment that alleged murder in the second degree. The Honorable Judge Meyer conducted a colloquy with the petitioner and accepted his guilty plea.

On August 30, 1994, the petitioner filed a *pro se* motion for new trial and asked for court appointed counsel. On November 2, 1994, Stephen Neyman, Esq., entered his

appearance as appointed counsel (petitioner's motion for appointed counsel having been allowed). Appointed counsel filed, on July 17, 1995, a replacement motion for new trial, alleging (1) that the plea was not voluntary because of pressure from the petitioner's parents and alleging (2) newly discovered evidence based on the affidavit of a codefendant.

Because Judge Meyer had retired, the motion was reassigned to the Honorable Judge Barrett, who, without holding an evidentiary hearing, issued a Memorandum and Order denying the petitioner's motion. The petitioner duly perfected his appeal to the Appeals Court of Massachusetts. On November 7, 1997, the Appeals Court issued a Memorandum and Order, pursuant to Rule 1:28, affirming the judgment of the Superior Court. The Appeals Court noted that a motion may be decided on the basis of affidavits without a hearing if no issue is raised by the motion or affidavits. In due course, the Massachusetts Supreme Judicial Court denied the petitioner's application for further appellate review.

On May 5, 1998, the petitioner filed, with new counsel, his second motion for new trial. This motion also claimed that the plea was not voluntary; the motion was based on the plea judge's erroneous definition of malice, and ineffective assistance of counsel in failing to earlier raise this issue, which was apparent on the record. The Commonwealth filed a response after being ordered to do so. On October 5, 1998, the Honorable Judge Dortch-O'Kara issued a Memorandum and Order denying the petitioner's motion. Judge Dortch-O'Kara's decision was grounded on her view that the plea judge had correctly defined malice. The petitioner seasonably perfected this appeal to the Appeals Court of Massachusetts. On April 3, 2000, the Appeals Court affirmed the denial of the second motion for new trial "for substantially the reasons set forth in the Commonwealth's brief at 10-25" (the entire argument section of said brief). In its brief, the Commonwealth argued that the plea met constitutional standards and that the petitioner had waived his argument by not asserting it in his first motion for new trial. The Commonwealth did not address the petitioner's ineffective assistance of counsel claim on the theory that such a claim was

more difficult to prove than a miscarriage of justice claim. The Commonwealth asserted that the petitioner did not meet the miscarriage standard, since the colloquy was complete and the crime was heinous. Further appellate review was denied by the Massachusetts Supreme Judicial Court on June 29, 2000.

The petitioner thereafter filed his habeas corpus petition in the United States District Court on March 29, 2001. The respondent then moved to dismiss the petition on the grounds that it was not timely filed. The case was referred to Magistrate Judge Cohen, who recommended that the petition be dismissed. The district court followed suit, issuing a Memorandum and Order dismissing the petition on August 13, 2001. The district court also denied a certificate of appealability, but the First Circuit Court of Appeals later granted a certificate. On February 5, 2003, the First Circuit Court of Appeals affirmed the district court's dismissal of the petition. In affirming the dismissal, the court of appeals stated that "the statutory one-year limit on filing initial habeas petitions is not mitigated by any statutory exception for actual innocence." App., *infra*, A10.

A. Facts

1. The Relevant Dates

The petitioner's first motion for new trial was filed in the state Superior Court before the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). The Massachusetts Supreme Judicial Court denied the application for further appellate review concerning the denial of that motion on December 29, 1997.

The petitioner filed his second motion for new trial on May 5, 1998 (127 days later). The Supreme Judicial Court denied his application for further appellate review concerning the denial of the second motion on June 29, 2000. The petitioner filed his habeas corpus petition in the United States District Court on March 29, 2001 (272 days later).

2. Attorney Error

The only evidence before the district court was counsel's affidavit, which indicated that he could have filed the petition months earlier but did not because he believed he was filing in a

timely manner.

3. Factual Innocence

The "evidence" before the state judge who accepted the defendant's guilty plea was the prosecutor's statement of the facts.

Abraham Champlain and his friend Scott Royal were living in a tent in a heavily wooded area of Faxon Park in Quincy, Massachusetts. Tr. 4/13/92:14. On October 1, 1990, Champlain withdrew his V.A. check; the petitioner, his girlfriend Cathy McAulife, Stephen Rose, and his girlfriend Marianne Labie, joined Champlain and Royal, drinking into the early evening. Tr. 4/13/92:14-15. Champlain and Royal left to get more alcohol and returned separately after an argument. Tr. 4/13/92:15. Rose announced that a kangaroo court would be held and Champlain was sentenced to hang. Tr. 4/13/92:15. Rose, Royal, and the petitioner hung Champlain upside down by the ankles from a tree; the petitioner threw several rocks at him. Tr. 4/13/92:16. Rose cut Champlain down. Tr. 4/13/92:16.

The next morning, the petitioner and Rose went to buy more alcohol and returned with vodka and a case of beer. Tr. 4/13/92:16. The group began drinking again. Tr. 4/13/92:16.

After threats by Rose, Champlain was made to strip and put on red pajamas. Tr. 4/13/92:16-17. The petitioner and the women poured things over Champlain's head and joked that he looked like a pizza. Tr. 4/13/92:17.

The petitioner and Rose dragged Champlain to a second tree and hung him upside down by his ankles again. Tr. 14/13/92:17. The petitioner and Rose then urinated on Champlain. Tr. 4/13/92:17. After cutting him down, the three men then dragged Champlain to the top of an adjacent cliff. Tr. 4/13/92:17. The petitioner and others rolled him off the cliff and he became stuck on a small tree part way down. Tr. 4/13/92:18.

The petitioner dragged Champlain to the bottom and then tied him to a third tree with his feet at the ground. Tr. 4/13/92:18. The petitioner then struck Champlain with a tree branch ten to fifteen times in the upper torso. Tr. 4/13/92:18. Rose cut Champlain down and left a blanket. Tr. 4/13/92: 18.

The prosecutor said that Dr. Boschetti would have testified that the cause of death was multiple blunt trauma but that the injuries themselves were probably not fatal. Tr. 4/13/92:20. The precise mechanism of death could have been one of a number of things, including exposure to the elements. Tr. 4/13/92:20.

After the prosecutor's recitation of the facts, the plea judge asked if the facts were correct and if the petitioner wanted to add or subtract from those facts. Tr. 4/13/92:23. The petitioner responded that he was substantially drunk at the time and had no intentions of killing the decedent. Tr. 4/13/92:23.

A review of this proffer indicates the main allegations against Mr. David. First, that he participated in hanging the victim by his ankles from a tree and threw rocks at him before the victim was cut down by Stephen Rose. Second, that he participated in hanging the victim from a second tree; and, then, after he was cut down, he participated in dragging the victim to the top of an adjacent cliff. Third, that he participated in rolling the victim off the cliff and dragged him to the bottom after he became stuck. Fourth, that he tied the victim to a third tree and struck him with a broken tree branch ten to fifteen times.

Although the prosecutor did not attribute a witness source for these claims, a review of the discovery materials makes it clear that the factual recitation is quite similar to a police interview given by Scott Royal in September of 1991. The trial court was never informed on the record of the numerous problems with Scott Royal, including his plea bargain to manslaughter, which was signed on October 10, 1991. Scott Royal gave earlier inconsistent statements. In addition, Scott Royal was subsequently charged with a very similar attack.

Stephen Rose, a codefendant, signed an affidavit in June of 1994 detailing Mr. David's lack of participation and naming Scott Royal as the main actor, an accusation that has significant force given Royal's subsequent involvement in a similar incident.

The other main witness in the case, Kathleen McAuliffe, also gave various stories after being immunized. The trial court was not told on the record that in her previous statements she

claimed not to have seen the cliff or the tree incidents. She did, however, at her deposition taken in connection with the criminal case on April 10, 1991, make several assertions that contradicted the statement of facts given in the trial court at the change of plea hearing.

REASONS WHY THE WRIT SHOULD BE GRANTED

As the First Circuit acknowledged (App., *infra*, A11), its decision in this case is at odds with the statements of courts of appeals in other circuits. This disagreement is likely to cause considerable inconsistency in how district courts in different circuits treat habeas corpus petitions. Indeed, while a district court in the First Circuit, following the precedent set by the decision in this case, would be precluded from recognizing an actual-innocence exception to 28 U.S.C. § 2244(d)(1)'s one-year period of limitation, at least one district court in another circuit has recognized such an exception and refused to dismiss a habeas corpus petition filed outside the one-year period of limitation because the petitioner had made a showing of actual innocence. *Nickerson v. Roe*, 2000 WL 33381022 at *1 (N.D.Cal. 2000). Furthermore, the issue of the availability of habeas corpus review to prisoners who can make a showing of actual innocence is important.

A. The Court of Appeals' Decision Is at Odds with Decisions of Courts of Appeals in Other Circuits

The First Circuit recognized that its position that there is no actual-innocence exception to the one-year time limit for filing habeas corpus petitions conflicted with positions expressed by other courts and cited, as an example, the Eleventh Circuit's decision in *Wyzykowski v. Dept of Corrections*, 226 F.3d 1213 (11th Cir. 2000). App., *infra*, A11. In *Wyzkowski*, the Court refused to answer conclusively whether the Suspension Clause requires an exception for actual innocence because the petitioner had not made an adequate showing, but it recognized that the petitioner's contention raised "a troubling and difficult constitutional question. . . . The question raises concerns because of the inherent injustice that results from the

conviction of the innocent and the technological advances that can provide compelling evidence of a person's innocence." 226 F.3d at 1218. Following the decision in this case, district courts in the First Circuit are free to ignore this troubling constitutional question and can simply dismiss untimely habeas corpus petitions without even considering petitioners' claims of actual innocence—no matter how strong those claims are.

The First Circuit's decision is even more directly in conflict with the Tenth Circuit's decision in *Gibson v. Klinger*, 232 F.3d 799(10th Cir. 2000). In that case, the Court stated, in no uncertain terms, that "AEDPA's one-year statute of limitations is subject to equitable tolling . . . when a prisoner is actually innocent." *Id.* at 808, citations omitted. The decision in this case is also at odds with the Ninth Circuit's decision in *Majoy v. Roe*, 296 F.3d 770 (9th Cir. 2002). There, the Court postponed deciding the issue but remanded the case to the district court, ordering that court to determine whether the petitioner could establish a colorable claim of actual innocence. *Id.* at 777-778.

The only court of appeals to agree, in explicit terms, with the First Circuit's position is the Eight Circuit, which, in *Flanders v. Graves*, 299 F.3d 974, 977 (8th Cir. 2002), stated that "[t]o allow an assertion of actual innocence to excuse the running of the statute in such circumstances would take the equitable-tolling doctrine far from its original and legitimate rationale." The only circumstances under which the Eight Circuit would allow for an exception to the one-year limit is where the petitioner can prove that "some action or inaction on the part of the respondent prevented him from discovering the relevant facts in a timely fashion, or, at the very least, that a reasonably diligent petitioner could not have discovered these facts in time to file within the period of limitations." *Id.* at 978.

This conflict between the circuits is likely to create considerable confusion and inconsistency in the district courts. District courts in the First and Eighth Circuits are directed to dismiss habeas corpus petitions filed outside the one-year time limit, ignoring even the strongest claims of actual innocence. In fact, one district court in the Sixth Circuit, which has not

directly addressed the issue, did just that. *Brown v. McKee*, 232 F.Supp.2d 761 (E.D.Mich. 2002). Citing *Flanders*, that court refused to consider the petitioner's claim of actual innocence and dismissed the habeas corpus petition because it was filed outside the one-year period of limitations. *Id.* at 768-69.

At the same time, petitioners filing habeas corpus petitions in other circuits will have access to habeas corpus review, despite failing to comply with the one-year time limit, if they can establish a colorable claim of actual innocence. In fact, at least one district court has declined to dismiss a habeas corpus petition because the petitioner made out a claim of actual innocence, *Nickerson v. Roe*, 2000 WL 33381022 at *1 (N.D.Cal. 2000), and other district courts have worked on the assumption that an actual-innocence exception does exist. *E.g. Thomas v. Welborn*, 2000 U.S. Dist. LEXIS 17974, at 9 (N.D. Ill.) (assuming that a colorable showing of actual innocence would overcome statute of limitations); *U.S. v. Zuno-Arce*, 25 F.Supp. 2d 1087, 1102 (C.D. Cal. 1998) (considering petitioner's claim of actual innocence after "hold[ing] that to foreclose a claim of constitutional violation where there has been a colorable showing of factual innocence would likely constitute a due process violation or an improper suspension of habeas corpus relief"); *Alexander v. Keane*, 991 F.Supp. 329, 334-339 (S.D.N.Y. 1998) (assuming, without deciding, that a showing of actual innocence would overcome AEDPA's statute of limitations).

This case provides an opportunity to bring clarity to this issue and consistency to the lower courts. Therefore, the Court should grant certiorari.

B. The Questions Presented are Important

DNA testing has led to the exoneration of at least 123 wrongly convicted people in the United States. Barry C. Sheck and Sarah L. Tofte, Gideon's Promise and the Innocent Defendant, Champion (January/February 2003). At the present time, however, DNA testing is only available in a very small number of cases—essentially, just in rape and rape-murder cases. *See* Geoffrey Christopher Rapp, DNA's Dark Side, 110

Yale L.J. 163, 167 (2000). So, while DNA testing has revealed a very real problem with the conviction of the innocent, the true scope of the problem remains unknown.

Prisoners who can make a showing of actual innocence should be given the opportunity to have their substantive constitutional claims considered on habeas corpus review. This Court has recognized this principle on more than one occasion. *Herrera v. Collins*, 506 U.S. 390, 404 (1993) ("In a series of cases culminating with *Sawyer v. Whitley*, 505 U.S. 333 (1992) . . ., we have held that a petitioner otherwise subject to defenses of abusive or successive use of the writ may have his federal constitutional claim considered on the merits if he makes a proper showing of actual innocence."). These cases have been decided under the Court's miscarriage-of-justice doctrine, which establishes that habeas corpus petitioners' procedural defaults may be excused if they can demonstrate "that failure to consider the claims will result in a fundamental miscarriage of justice." *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). The exception created by this doctrine is a narrow one, but it clearly extends to cases where the petitioner can make a colorable claim of actual innocence. *See Schlup v. Delo*, 513 U.S. 298,324-25 (1995) ("[T]he quintessential miscarriage of justice is the execution of a person who is entirely innocent."). As this line of cases makes clear, the issue raised by this case is an important one.

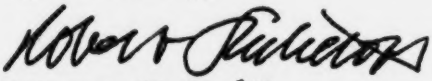
The court of appeals' decision in this case precludes habeas corpus review for petitioners who fail to meet the one-year period of limitation, even if they can make a colorable showing of actual innocence. This decision implicates the most fundamental values of our system of criminal justice. Considering the large number of recent cases where DNA testing has exonerated innocent people, including individuals on death row, *see* Barry C. Scheck, Preventing the Execution of the Innocent: Testimony before the Senate Judiciary Committee, 29 Hofstra L.Rev. 1165 (2001), the issue raised by this case is particularly important at the present time.

Because the questions raised by this case are fundamentally important, the Court should grant the petition.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,
By his attorney,



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Opinion of the United States District
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Report and Recommendation of the United
States Magistrate Judge A17

STEPHEN DAVID, Petitioner, Appellant,
v.
TIMOTHY HALL, Respondent, Appellee.

No. 01-2289

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

318 F.3d 343; 2003 U.S. App. LEXIS 1961

February 5, 2003, Decided

PRIOR HISTORY:
[**1] APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS. Hon. George A. O'Toole, Jr., U.S. District Judge.

David v. Hall, 2001 U.S. Dist. LEXIS 18326 (D. Mass. Aug. 13, 2001)

DISPOSITION:
Affirmed.

COUNSEL:
Robert L. Sheketoff for petitioner.

Cathryn A. Neaves, Assistant Attorney General, Criminal Bureau, with whom Thomas F. Reilly, Attorney General, was on brief for respondent.

JUDGES:
Before Boudin, Chief Judge, Torruella and Lipez, Circuit Judges.

OPINIONBY:
BOUDIN

OPINION:

[*343] **BOUDIN, Chief Judge.** In this case, which raises questions concerning habeas corpus, the relevant dates are important. On April 13, 1992, petitioner Stephen David pled guilty in a Massachusetts state court to second-degree murder and was sentenced to life imprisonment. The crime was described in the plea colloquy: briefly stated, David and others, camping at a tent city in Quincy, Massachusetts, killed one of their number (Abraham Champlain) by beating and otherwise mistreating him over the course of several days and leaving him to die of his injuries and exposure to cold. The members of the group, including David, had consumed alcohol.

No direct appeal was taken from the conviction. Instead, more than three years after his plea and sentencing, David filed in the trial court two [**2] successive motions to withdraw his guilty plea and obtain a new trial, which under state law is a permissible form of collateral attack after a guilty plea. Constantine v. Commonwealth, 435 Mass. 1011, 1012, 760 N.E.2d 733, 735 (2002). Both motions were rejected by the trial court and the intermediate appellate court and, in both cases, the Supreme Judicial Court denied review. The first motion was filed on or about July 17, 1995, and SJC review was denied on December 29, 1997; the second was filed on May 5, 1998, and SJC review was denied on June 29, 2000. David did not seek certiorari on either ruling from the United States Supreme Court.

[*344] On March 29, 2001, David filed the present habeas proceeding in the federal district court. In his petition, David asserts that, for second degree murder, Massachusetts law required that he know that his actions had a "plain and strong likelihood" of causing Champlain's death. Commonwealth v. Sneed, 413 Mass. 387, 388 n.1, 597 N.E.2d 1346, 1347 n.1 (1992). And, he asserts, the trial judge committed constitutional error by misadvising David at the plea colloquy that an intent to cause injury was sufficient. See [**3] Henderson v. Morgan,

426 U.S. 637, 643-46, 49 L. Ed. 2d 108, 96 S. Ct. 2253 (1976). He also asserts that, due to his intoxication, a jury could not have found that he had the intent required under state law.

In fact, at the plea colloquy, the trial judge used both phrases, saying that an intent to injure was enough and that there had to be knowledge of "a plain and strong likelihood" of death. But whether the instruction was confusing (the state courts said no) and, if so, whether it constituted a constitutional violation are issues not before us. This is so because in opposing the writ, the Commonwealth pled that regardless of its merits, David's petition came too late under the deadlines fixed for habeas petitions by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2241 et seq. (2000).

AEDPA, which became effective on April 24, 1996, fixes a one-year limitations period for federal habeas petitions by state prisoners. 28 U.S.C. § 2244(d)(1). Statutory exceptions exist where the state impeded relief, new constitutional rights were created by the Supreme Court, or newly discovered [**4] facts underpin the claim, id. § 2244(d)(1)(B)-(D), but David does not claim to fall within any of these exceptions. Absent an exception, AEDPA's one-year limit runs from the time that the state court judgment of conviction became final by the conclusion of direct review or the expiration of the time for seeking it. Id. § 2244(d)(1)(A). However, defendants like David, convicted prior to AEDPA, can file their petitions within one year of AEDPA's effective date. Gaskins v. Duval, 183 F.3d 8, 9 (1st Cir. 1999).

A magistrate judge recommended dismissal of David's petition on the ground that it was barred by AEDPA's time limit. AEDPA excludes from the one-year period "the time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending ...." 28 U.S.C. § 2244(d)(2). The magistrate judge excluded from the calculation the days in which the two state new trial motions were pending (measuring from the dates of their filings to the ultimate SJC dispositions). Even with this exclusion, David's petition was filed 399 days after AEDPA's

enactment and, [**5] therefore, more than the 365 days allowed. The district court adopted the recommendation.

David then sought a certificate of appealability ("COA"), 28 U.S.C. § 2253(c), which the district court denied. This court then granted the COA and asked the parties to brief several issues: David's claim that 180 days should be added to the excluded period for the time in which he could have sought certiorari in the United States Supreme Court; n1 his alternative request that the time period be "equitably tolled" because of his attorney's error in filing late; and his claim that the Constitution's Suspension Clause overrides the [*345] AEDPA limit when the petitioner asserts that he is actually innocent of the underlying offense. We now address these issues in the same order.

n1 A petitioner in a criminal case has 90 days to petition the United States Supreme Court after receiving a final judgment from the highest court of his state. S. Ct. R. 13(1). Because David received two adverse judgments from the SJC, he has asked that the limitations period be tolled 180 days.

[**6]

David's first argument--that 180 days should be added to the excluded period--is easily answered. Congress excluded from the one-year period the time during which "a properly filed application for State post-conviction or other collateral review ... is pending ...." Id. § 2244(d)(2). The reason is obvious. During the period when the state courts are reviewing the claims, a federal petition would likely be dismissed or held as premature and would at best simply be held until state remedies were exhausted. 28 U.S.C. § 2254(b)(1)(A).

Nothing in the language or policy of this exclusion warrants adding to the excluded period an additional period during which the petitioner could have, but did not, seek certiorari in the Supreme Court from the denial of collateral remedies. Once the

SJC denied review as to the first new trial motion, nothing was pending in either state or federal court nor was any further action ever taken in any court with respect to that motion. The same is true for the second motion. Thus, to say that David's collateral attack proceedings were pending in any court during the 90-day periods after the SJC denials is at odds with [**7] ordinary usage. n2

> n2 The state further argues that the reference to "State post-conviction or other collateral review" necessarily excludes the federal certiorari process, so that the result would be the same even if David had filed for certiorari. Duncan v. Walker, 533 U.S. 167, 150 L. Ed. 2d 251, 121 S. Ct. 2120 (2001), on which the state heavily relies, is arguably distinguishable and there are language and policy arguments on the other side, but the issue need not be resolved in this case.

If anything more were needed, it is supplied by the contrasting language of a companion AEDPA provision. In the ordinary post-AEDPA case, the one-year period (exceptions aside) runs from the later of two dates: "the date ... the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." 28 U.S.C. § 2244(d)(1)(A) (emphasis supplied). Thus, if David had been convicted after trial and fought his conviction through the [**8] SJC, he would automatically have gotten the benefit of the additional 90 days for seeking certiorari--that is, those days would have been excluded from the one-year period by virtue of the underscored language. No such language appears in the collateral attack provision applicable here.

David says that he had no direct review remedy under state law because of his guilty plea so that, to create equality of opportunity, the underscored language should be read into the collateral attack provision or the collateral attack should be equated in this case with direct review. This argument has the

matter backwards. Congress did not aim at equality: it specifically provided a more generous exclusion of time where direct review was involved and, consistent with the spirit of AEDPA, took a stricter view as to state post-conviction remedies.

David next argues that the running of the limitations period should be equitably tolled because the failure to file the petition within the required period was due to error by David's counsel. The factual premise is an affidavit from counsel stating that he could have filed the petition earlier but did not think this was required. "Equitable tolling" is [**9] an umbrella term for the notion that a statute of limitations--unless its time limit is "jurisdictional"--may be extended for equitable reasons not acknowledged [*346] in the statute creating the limitations period. See, e.g., Delaney v. Matesanz, 264 F.3d 7, 13-14 (1st Cir. 2001).

Section 2244 does not describe its time limits as jurisdictional, either in its own terms or otherwise, nor does the Commonwealth invoke that label. See Miller v. N.J. State Dept. of Corrections, 145 F.3d 616, 617-18 (3d Cir. 1998). Still, section 2244(d) comprises six paragraphs defining its one-year limitations period in detail and adopting very specific exceptions. Congress likely did not conceive that the courts would add new exceptions and it is even more doubtful that it would have approved of such an effort. Taliani v. Chrans, 189 F.3d 597, 598 (7th Cir. 1999). AEDPA reflects Congress' view that the courts were being too generous with habeas relief and that the whole system needed to be tightened up. See H.R. Rep. No. 104-518, at 111 (1996).

Nevertheless, many circuits have held or assumed that equitable tolling is available, n3 and we will [**10] proceed here on that arguendo assumption. The "exclusion" inference against such a reading of section 2244 is matched, as such rubrics often are, by a counter inference: that Congress acts against the background of existing decisional doctrine unless it negates the doctrine. Young v. United States. 535 U.S. 43, 122 S. Ct. 1036, 1040, 152 L. Ed. 2d 79 (2002). This court, although

it has never decided whether equitable tolling is permitted under section 2244, Lattimore v. Dubois, 311 F.3d 46, 55 (1st Cir. 2002), has elsewhere been willing to read AEDPA flexibly. See Evicci v. Commissioner of Corrections, 226 F.3d 26, 28 (1st Cir. 2000).

n3 See e.g., Dunlap v. United States, 250 F.3d 1001, 1004-06 (6th Cir.), cert. denied, 534 U.S. 1057, 122 S. Ct. 649, 151 L. Ed. 2d 566 (2001); Taliani, 189 F.3d at 598; Miller, 145 F.3d at 617-18 (3d Cir. 1998).

If equitable tolling is available to extend [**11] section 2244(d)'s limitations period, it can only do so for the most exceptional reasons. One of AEDPA's main purposes was to compel habeas petitions to be filed promptly after conviction and direct review, to limit their number, and to permit delayed or second petitions only in fairly narrow and explicitly defined circumstances. 28 U.S.C. § 2244(d)(1)(A)-(D); H.R. Rep. No. 104-518, supra at 111. To bypass these restrictions for reasons other than those given in the statute could be defended, if at all, only for the most exigent reasons.

Here, the magistrate judge thought, and the district court, agreed, that a mistake by counsel in reading the statute or computing the time limit is, at most, a routine error. Indeed, it would not even constitute "excusable neglect" under Fed. R. App. P. 4(a)(5). See Mirpuri v. ACT Mfg., 212 F.3d 624, 630-31 (1st Cir. 2000). Even apart from AEDPA, the Supreme Court has said that "the principles of equitable tolling ... do not extend to what is at best a garden variety claim of excusable neglect." Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 96, 112 L. Ed. 2d 435, 111 S. Ct. 453 (1990). n4 If carelessness were an escape [**12] hatch from statutes of limitations, they would hardly ever bar claims.

n4 Unsurprisingly, cases involving capital punishment are sometimes treated differently. E.g., Rouse v. Lee, 314

F.3d 698, 2003 U.S. App. LEXIS 145 at *17 (4th Cir. 2003) (excusing one day delay due to attorney error in habeas case where petitioner faced death penalty and would not have any other avenue of post-conviction review).

David's final argument is that the limitations period, if otherwise applicable to him and unmitigated here by equitable tolling, violates the Constitution. Article I, section 9, clause 2, provides that the "writ of habeas corpus shall not be suspended," [*347] save in cases of rebellion or invasion. David argues that any statutory limitations period that prevents him from presenting a claim predicated on "actual innocence" amounts to an unconstitutional suspension of the writ. Compare Delaney v. Matesanz, 264 F.3d 7, 12 (1st Cir. 2001) (upholding the one year limit only "as a general matter").

Assuming [**13] arguendo that the Suspension Clause extends beyond the narrow historical office of the writ, cf. McCleskey v. Zant, 499 U.S. 467, 478, 113 L. Ed. 2d 517, 111 S. Ct. 1454 (1991), it could only be violated by enactments that make the writ "inadequate or ineffective to test the legality of (the applicant's) detention." Swain v. Pressley, 430 U.S. 372, 381, 51 L. Ed. 2d 411, 97 S. Ct. 1224 (1977). Here, the argument made by David was available to him from April 1992 onward and, excluding the time for exhausting remedies, he had ample time after AEDPA in which to bring his claim within the statutory deadline. In these circumstances, the limitation is not even arguably unconstitutional. Molo v. Johnson, 207 F.3d 773, 775 (5th Cir. 2000).

It would be another matter if David's constitutional claim regarding the misstatement of the elements of the murder came to light only after the limitations period had expired. But Congress has provided that in such a case a petitioner may bring his claim a year from the "date on which the factual predicate of the claim ... could have been discovered through the exercise of due diligence." 28 U.S.C. § 2244(d)(1)(D) . [**14] Here, any

error at the plea colloquy was immediately apparent, so this alternative starting date has no relevance for David.

Nothing is changed here by David's claim of actual innocence, a claim itself derived from his mistaken-colloquy argument. In general, defendants who may be innocent are constrained by the same explicit statutory or rule-based deadlines as those against whom the evidence is overwhelming: pre-trial motions must be filed on time, timely appeals must be lodged, and habeas claims must conform to AEDPA. In particular, the statutory one-year limit on filing initial habeas petitions is not mitigated by any statutory exception for actual innocence even though Congress clearly knew how to provide such an escape hatch. n5

> n5 In AEDPA Congress adopted a form of actual innocence test as one component of its threshold requirements for allowing a second or successive habeas petition; but it also provided that this second petition is allowed only where the factual predicate for the claim of constitutional error could not have been discovered previously through the exercise of due diligence. 28 U.S.C. § 2244(b)(2)(B).

[**15]

There is a strong public interest in the prompt assertion of habeas claims. Normally, the grant of habeas relief leaves the state free to retry the petitioner, but this becomes increasingly hard to do as memories fade, evidence disperses and witnesses disappear. A defendant who could not have filed his petition earlier is at least a sympathetic figure; one who has a known claim, defers presenting it, and then asks to be excused for the delay is unlikely to get cut much slack. A couple of cases have conjectured that actual innocence might override the one-year limit, e.g., Wyzykowski v. Dept. of Corrections, 226 F.3d 1213, 1218-19 (11th Cir. 2000); but to us these dicta are in tension with the statute and are not persuasive.

The actual innocence rubric--a phrase courts use differently in different contexts, see Calderon v. Thompson, 523 U.S. 538, 559-66, 140 L. Ed. 2d 728, 118 S. Ct. 1489 (1998)--has been firmly disallowed by the Supreme Court as an independent ground of habeas relief, save (possibly) in extraordinary [*348] circumstances in a capital case. Herrera v. Collins, 506 U.S. 390, 417, 122 L. Ed. 2d 203, 113 S. Ct. 853 (1993). [**16] By contrast, the Court has used an actual innocence test as a safety valve where an issue was not timely presented in the original trial, Schlup v. Delo, 513 U.S. 298, 130 L. Ed. 2d 808, 115 S. Ct. 851 (1995), but we are not here concerned with a claim forfeited under the cause and prejudice standard.

As it happens, David has not made out a predicate showing of "actual innocence," if the phrase is taken to mean that no jury would likely convict David based on the currently known evidence. This is so even if the jury was here instructed exactly as David says Massachusetts law requires. In the end, the defense would depend largely on whether the jury believed David's own self-serving testimony about his own mental state--a conclusion which, given his active participation in Champlain's mistreatment over several days, a jury might easily resist.

Affirmed

STEPHEN A. DAVID, Petitioner

vs.

TIMOTHY HALL, Respondent

CIVIL ACTION NO. 01-10537 GAO

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

2001 U.S. Dist. LEXIS 18326

August 13, 2001, Decided

COUNSEL:
For STEPHEN DAVID, Petitioner: Robert L. Sheketoff, Sheketoff & Homan, Boston, MA.

For TIMOTHY HALL, Respondent: Cathryn A. Neaves, Attorney General's Office, Boston, MA.

JUDGES:
George A. O'Toole, Jr., DISTRICT JUDGE.

OPINIONBY:
George A. O'Toole, Jr.

OPINION:

MEMORANDUM AND ORDER

August 13, 2001

O'TOOLE, D.J.

The respondent Timothy Hall has moved to dismiss the Petition for Writ of Habeas Corpus, filed by petitioner Steven A. Hall pursuant to 28 U.S.C. § 2254, on the ground that it is time-barred within the meaning of 28 U.S.C. § 2244(d)(1). The case was referred to a Magistrate Judge, who has issued a Report and Recommendation concluding that the motion to dismiss be granted and the petition dismissed. The petitioner filed timely objections to the Report and Recommendation.

After review of the parties' original submissions, the Report and Recommendation, and the petitioner's objections to it, I conclude that the Magistrate Judge's recommended disposition is correct and adopt it. I add the following brief comments to the Magistrate Judge's exposition of the issues.

Since the petitioner's [*2] state conviction became final prior to the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), which added the limitations period for habeas petitions, his petition would have been timely filed if brought within the limitations period if measured from the date of the AEDPA's enactment. See Gaskins v. Duval, 183 F.3d 8, 9 (1st Cir. 1999). Thus, if the limitations period was not tolled for any reason, a petition would be timely if filed on or before April 24, 1997. However, in the petitioner's case, the one-year period was tolled for two intervals "during which a properly filed application for State post-conviction or other collateral review" was pending. 28 U.S.C. § 2244(d)(2). However, even accounting for those exclusions, measured from the date of filing of the post-conviction motion for a new trial to the final action by a state court on the matter, the present petition was filed outside the limitations period. The petitioner presents two theories which might support further tolling for long enough to make the petition timely.

First, he argues that the limitations period should be deemed tolled for an additional [*3] 90 days after final state court action on the new trial motions, a period equal to the time allowed for the filing of a petition for certiorari with the United States Supreme Court. Although the First Circuit has not explicitly addressed this point, the consensus of the circuits that have

addressed it is that § 2244(d)(2) does not require tolling of the limitations period for the additional time after final state court action during which a petition for certiorari might be filed. See Crawley v. Catoe, 257 F.3d 395, 2001 U.S. App. LEXIS 15903, 2001 WL 797767 at *3-4 (4th Cir. 2001); Stokes v. District Att'y of the County of Philadelphia, 247 F.3d 539, 542-43 (3d Cir. 2001); Snow v. Ault, 238 F.3d 1033, 1035 (8th Cir. 2001); Gutierrez v. Schomig, 233 F.3d 490, 491 (7th Cir. 2000); Isham v. Randle, 226 F.3d 691, 695 (6th Cir. 2000); Coates v. Byrd,211 F.3d 1225, 1226 (11th Cir. 2000); Ott v. Johnson, 192 F.3d 510, 513 (5th Cir. 1999); Rhine v. Boone, 182 F.3d 1153, 1155-56 (10th Cir. 1999); see also, Mayne v. Hall, 122 F. Supp. 2d 86, 94 (D. Mass. 2000). [*4] Like the Magistrate Judge, I find the consensus persuasive, and follow it.

Second, the petitioner asks that the doctrine of "equitable tolling" be applied to relieve him of the consequence of late filing that resulted from inaccurate advice from his lawyer. I agree with the Magistrate Judge that an attorney's error in advising the petitioner about the limitations period is not enough to justify application of the "equitable tolling" doctrine. See Kreutzer v. Bowersox, 231 F.3d 460, 463 (8th Cir. 2000); Harris v. Hutchinson, 209 F.3d 325, 329-30 (4th Cir. 2000); Taliani v. Chrans, 189 F.3d 597, 598 (7th Cir. 1999).

Accordingly, because the petition was filed after the expiration of the statutory limitations period as extended by applicable tolling, it is time-barred. The merits of a petition that is barred by a procedural default might still be addressed if it appears that a failure to do so would constitute a "miscarriage of justice." The petitioner makes such an averment in the petition. In this context, a "miscarriage of justice" could be established by a showing that the petitioner is actually innocent of the crime he was convicted [*5] of committing.

"Actual innocence" means *factual*, not legal, innocence. See Bousley v. United States, 523 U.S. 614, 623-24, 140 L. Ed. 2d 828, 118 S. Ct. 1604 (1998) (citing Sawyer v. Whitley, 505 U.S. 333, 339, 120 L. Ed. 2d 269, 112 S. Ct. 2514 (1992)). To take advantage of the exception, the petitioner must show more than

that his conviction was the result of a constitutional defect in his guilty plea colloquy; he must show that the defect "has probably resulted in the conviction of one who is actually innocent." Bousley, 523 U.S. at 623 (quoting Murray v. Carrier, 477 U.S. 478, 496, 91 L. Ed. 2d 397, 106 S. Ct. 2639 (1986)). To make that showing of probability, the petitioner must show that it is more likely than not that no reasonable juror would have convicted him on the available evidence, including evidence he newly offers. See Schlup v. Delo, 513 U.S. 298, 327, 130 L. Ed. 2d 808, 115 S. Ct. 851 (1995). To be credible, a claim of actual innocence must be based on "reliable evidence" not presented to the trial court. Calderon v. Thompson, 523 U.S. 538, 559, 140 L. Ed. 2d 728, 118 S. Ct. 1489 (1998) [*6] (citing Schlup, 513 U.S. at 324).

The petitioner's proffered showing here is inadequate to justify application of the "actual innocence" exception to excuse his procedural default. He points to inconsistencies in the accounts of other participants in the events that culminated in the murder to which he pled guilty, including accounts that were available at the time of his guilty plea in 1992, and one, in an affidavit by one of the participants, that emerged two years later and served as the basis for a claim of "newly discovered evidence" in the state courts. Taken by itself, that affidavit is not reliable evidence. The affiant summarily disavows his own prior statements, creating an inconsistency between his own versions of events. Except that it is later in time, there are no corroborative factors that would tend to lead an objective observer to conclude that the affiant is telling the truth in the affidavit, as opposed to in his prior statements.

Taken in context, the affidavit is even less impressive. It is of crucial significance that the petitioner's conviction did not result from a verdict by a jury that heard and evaluated conflicting evidence at a trial, [*7] but rather from the petitioner's acknowledgment of guilt. At the plea colloquy, the prosecutor offered a factual basis for the plea which, if true, certainly supported the petitioner's conviction of second degree murder. Whatever misunderstanding the petitioner might have had about what the proper legal definition of "malice" was as an

element of second degree murder (the basis for the present petition), so far as appears from the record he made no protest at the colloquy that the historical facts summarized by the prosecutor were inaccurate, especially as they detailed his personal participation in the murder. His own implicit acceptance of that statement of facts at the plea colloquy cannot be discredited simply by pointing to the later changed story of another participant.

The evidence proffered by the petitioner does not come close to showing his "actual innocence" of the crime for which he was convicted. He is not relieved of the bar to the present petition erected by the expiration of the time period within which his petition must have been brought.

I adopt the Magistrate Judge's recommendation that the motion to dismiss be GRANTED and the Petition DISMISSED.

It is SO ORDERED. [*8]

August 13, 2001
DATE

George A. O'Toole, Jr.
DISTRICT JUDGE

STEPHEN DAVID, Petitioner v. TIMOTHY HALL, Respondent

Civil Action No. 01-10537-GAO

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

2001 U.S. Dist. LEXIS 23156

July 6, 2001, Decided

SUBSEQUENT HISTORY:
Adopted, habeas corpus dismissed, David v. Hall, 2001 U.S. Dist. LEXIS 18326 (D. Mass. Aug. 13, 2001).

DISPOSITION:
[*1] Recommended that respondent's motion to dismiss petition for writ of habeas corpus be allowed.

COUNSEL:
For STEPHEN DAVID, Petitioner: Robert L. Sheketoff, Sheketoff & Homan, Boston, MA.

For TIMOTHY HALL, Respondent: Cathryn A. Neaves, Attorney General's Office, Boston, MA.

JUDGES:
Lawrence P. Cohen, UNITED STATES MAGISTRATE JUDGE.

OPINIONBY:
Lawrence P. Cohen

OPINION:

REPORT AND RECOMMENDATION ON RESPONDENT'S MOTION TO DISMISS PETITION FOR WRIT OF HABEAS CORPUS

July 6, 2001

COHEN, M.J.

Pursuant to Rules 7.1(d) and (e) of the Local Rules of this Court [effective September 1, 1990], and upon review of the relevant pleadings, this court recommends that the district judge to whom this case is assigned allow respondent's Motion to Dismiss Petition for Writ of Habeas Corpus (# 08) on the grounds that this federal habeas petition is time-barred within the meaning of 28 U.S.C. 2244(d)(1). n1

n1 Section 2244 provides:

§ 2244, Finality of determination

(a) No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus, except as provided in section 2255.

(b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless--

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B)(1) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(3)(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

(4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.

(c) In a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court, a prior judgment of the Supreme Court of the United States on an appeal or review by a writ of certiorari at the instance of the prisoner of the decision of such State court, shall be conclusive as to all issues of fact or law with respect to an asserted denial of a Federal right which constitutes ground for discharge in a habeas corpus proceeding, actually adjudicated by the Supreme Court therein, unless the applicant for the writ of habeas corpus shall plead and the court shall find the existence of a material and controlling fact which did not appear in the record of the proceeding in the Supreme Court and the court shall further find that the applicant for the writ of habeas corpus could not have caused such fact to appear in such record by the exercise of reasonable diligence.

(d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of--

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

[*2]

On his plea of guilty, petitioner was convicted of murder in the second degree in the Norfolk County Superior Court on or about April 13, 1992. All parties agree that, the judgment of conviction having been imposed before the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), absent any additional tolling n2 within the meaning of Section 2244(d), the petition filed in his court is out of time. n3

n2 As Indicated in note 3, Infra, some tolling has concededly applied. Petitioner urges additional tolling in the circumstances of this case.

n3 Respondent says (Memorandum of Law in Support of Respondent's Motion to Dismiss Petition for Writ of Habeas Corpus (# 09) that petitioner's state court conviction became final under Section 2244(d) on or about April 23, 1997. At that time, however, petitioner's first motion for a new trial was pending in the state courts. The Massachusetts Supreme Judicial Court denied an application for further appellate review in connection with the denial of the first motion for a new trial on December

29, 1997. Accordingly, the one-year clock began to run on December 29, 1997. One hundred and twenty-seven (127) days ran on the one year clock until petitioner filed his second motion for a new trial on May 5, 1998. The Massachusetts Supreme Judicial Court denied an application for further appellate review in connection with the denial of the second motion for a new trial on June 29, 2000. At that point, the one-year clock began to run again. This petition for a writ of habeas corpus was file on March 29, 2001 - 272 days after the clock began ro run again. A total of 399 hours had run until the petition was filed in this court, clearly more than the one year contemplated by Section 2244(d)(1).

As to these calculations, counsel for petitioner says (Memorandum in Support of Petitioner's Opposition to Respondent's Motion to Dismiss Petition for Writ of Habeas Corpus [# 11, p. 1]): "The factual assertions concerning dates in the respondent's motion to dismiss cannot be quarreled with[.]"

[*3]

Petitioner contends, however, additional tolling should be allowed under one of three theories, to wit: (1) an additional period of 90 days during which petitioner could have filed a petition for a writ of certiorari in the Supreme Court of the United States upon the denial of his motions for a new trial; n4 (2) equitable tolling; and (3) a claim of actual innocence.

n4 Since petitioner filed two separate motions for a new trial, applications for appellate review of which were denied by the Massachusetts Supreme Judicial Court on different occasions, petitioner seeks a total of 180 days under this theory.

1. Time for Petitioning for a Writ of Certiorari

Petitioner first contends that he could have filed a petition for a writ of certiorari in the Supreme Court of the United States within 90 days of the denial of his applications for further appellate review by the Massachusetts Supreme Judicial Court. Thus, he says, 180 additional days of tolling apply, making his current filing timely.

Although a judgment [*4] of conviction affirmed by a state's highest court on direct review is not final within the meaning of Section 2244(d)(1)(A) until - at the very least - 90 days have elapsed during which the convicted defendant could have filed a petition for a writ of certiorari in the Supreme Court of the United States, n5 e.g., Bowen v. Roe, 188 F.3d 1157 (9th Cir. 1999), that is not the case with respect to denials of motions for a new trial and other post-conviction remedies. On that, all of the courts of appeals which have addressed the matter have marched to the same drummer, that is, that the 90 day period for filing a petition for a writ of certiorari in the Supreme Court of the United States is not applicable to denials of motions for a new trial and other post-conviction remedies. See Gutierrez v. Schomig, 233 F.3d 490, 491-92 (7th Cir. 2000); Isham v. Randle, 226 F.3d 691 (6th Cir.2000); Coates v. Byrd, 211 F.3d 1225 (11th Cir.2000); Ott v. Johnson, 192 F.3d 510 (5th Cir.1999); cf. Rhine v. Boone, 182 F.3d 1153 (10th Cir.1999). n6 Accordingly, petitioner is not entitled to an additional [*5] 180 days under this theory.

n5 Regardless of whether a petition for a writ of certiorari was in fact filed.

n6 In the latter case, Rhine, the court held that the 90 day exclusion was not available even if a timely petition for a writ of certiorari had been filed.

2. Equitable Tolling

Petitioner next contends that the one-year clock should be equitably tolled because petitioner's counsel misconstrued the

filing requirements under Section 2244(d). n7 That clearly is not the law in this Circuit or elsewhere. Generally speaking, equitable tolling is applied in rare circumstances. The general principles of equitable tolling were set forth in (Jones v. Morton, 195 F.3d 153 (3d Cir. 1999)). There that Court observed (Id. at 160):

We observed in Miller v. New Jersey State Dep't of Corrections 145 F.3d 616 that "equitable tolling is proper only when the 'principles of equity would make the rigid application of a limitation period unfair.'" Id. 145 F.3d at 618 (quoting Shendock v. Director, Office of Workers' Comp. Programs, 893 F.2d 1458, 1462 (3d Cir.1990) [*6] (in banc)) (punctuation marks omitted). This "unfairness" generally occurs "when the petitioner has 'in some extraordinary way ... been prevented from asserting his or her rights.'" Id. (quoting Oshiver v. Levin, Fishbein, Sedran & Berman, 38 F.3d 1380 (3d Cir.1994)). Finally, we noted that "the petitioner must show that he or she 'exercised reasonable diligence in investigating and bringing [the] claims...' Mere excusable neglect is not sufficient." Id. 145 F.3d at 618-19 (citations omitted).

In other cases, we have explained that equitable tolling "may be appropriate if (1) the defendant has actively misled the plaintiff, (2) if the plaintiff has 'in some extraordinary way' been prevented from asserting his rights, or (3) if the plaintiff has timely asserted his rights mistakenly in the wrong forum." United States v. Midgley, 142 F.3d 174, 179 (3d Cir.1998) (quoting Kocian v. Getty Refining & Mktg. Co., 707 F.2d 748, 753 (3d Cir.1983). In Seitzinger v. Reading Hosp. & Med. Ctr., 165 F.3d 236 (3d Cir.1999), we recently held that "equitable tolling may be appropriate [in a Title VII action] when a claimant [*7] received inadequate notice of her right to file suit, where a motion for appointment of counsel is pending, or where the court has misled the plaintiff into believing that she had done everything required of her." Id. at 240 (citing Baldwin Cty. Welcome Ctr. v. Brown, 466 U.S. 147, 151, 104 S. Ct. 1723, 80 L. Ed. 2d 196 (1984)). In the final analysis, however, "a statute of limitations should be tolled only in the rare situation where

equitable tolling is demanded by sound legal principles as well as the interests of justice." Midgley, 142 F.3d at 179 (quotations marks and citation omitted); see also Seitzinger, 165 F.3d at 239 ("The law is clear that courts must be sparing in their use of equitable tolling."). (Emphasis added).

n7 In an Affidavit of Counsel (# 12, pp. 2-3, P 10), petitioner's counsel avers:

> This affidavit is also presented in part to establish that the petitioner was not responsible for the delay in filing his habeas corpus petition after the Supreme Judicial Court denied further appellate review of the decision denying his second motion for new trial. I misconstrued the statute if in fact, the time for filing had passed. I believed that I was filing the petition in a timely manner. I could have and would have filed the petition months earlier if I had understood that the respondent's position is accurate.

[*8]

Indeed, the very claim made here - *i.e.*, that counsel erroneously believed that, for whatever reason, petitioner had additional time to file his federal petition for a writ of habeas corpus - has been specifically rejected as a basis for equitable tolling. See Harris v. Hutchinson, 209 F.3d 325, 2000 WL 345398 *5-*6 (4th Cir.2000). Petitioner has failed to make out an exceptional case warranting equitable tolling. n8

n8 This is not a case where petitioner may have relied on established case law to his detriment. Insofar as this court can determine, no court of appeals (and certainly none referred to by petitioner) has ever held that a federal habeas petitioner is entitled to another 90 days grace after the denial of a post-conviction remedy by the state's highest court. Rhine v. Boone, supra, holding that the 90 day exclusion was not available even if a timely petition

for a writ of certiorari had been filed, was decided just short of a year, that is, on July 7, 1999, before the Massachusetts Supreme Judicial Court denied petitioner's application for further appellate review of the denial of his second motion for a new trial. And all of the other decisions of the circuits referred to above, *i.e.*, Gutierrez v. Schomig, 233 F.3d 490, 491-92 (7th Cir. 2000); Isham v. Randle, 226 F.3d 691 (6th Cir.2000); Coates v. Byrd, 211 F.3d 1225 (11th Cir.2000); Ott v. Johnson, 192 F.3d 510 (5th Cir.1999), were decided in 1999 and 2000.

[*9]

2. Actual Innocence

Finally, petitioner seemingly contends that there are no limitations in a case in which a federal habeas petitioner claims actual innocence. And in support of this approach, counsel for petitioner has filed his Affidavit of Counsel (# 12) in which he purports that he can make out a claim of actual innocence. n9

n9 In Paragraph 1 of that Affidavit, counsel avers:

That this affidavit is presented in part in order to establish that the petitioner can make out a substantial claim of actual innocence on the charge of second degree murder. (Emphasis added).

For one thing, however, although some courts have suggested that applying the limitations period in Section 2244(d)(1) might raise constitutional concerns under the Suspension clause, e.g., Triestman v. United States, 124 F.3d 361, 378-79 (2d Cir. 1997); Wyzykowski v. Department of Corrections, 226 F.3d 1213 (11th Cir. 2000); Lucidore v. New York State Division of Parole, 209 F.3d 107 (2d Cir. 2000), [*10] no court, insofar as this court can determine, has held that applying the Congressionally mandated statute of limitations in

the face of a claim of actual innocence is, in fact, unconstitutional. n10 Moreover, this is not a case where petitioner asserts actual innocence, much less actual innocence in a timely manner. In his second motion for a new trial, petitioner contended that the trial judge, during the course of the change of plea colloquy, gave an erroneous definition of the term "malice" - and nothing more. That same claim, and nothing more, is made in the petition before this court. See Ground A of the petition. In his second motion for a new trial in the state courts, petitioner did not contend that he was actually innocent. Nor did he do so in his petition before this court. Only when respondent moved to dismiss did counsel for petitioner say in his affidavit that petitioner could make out a claim of actual innocence.

n10 Petitioner refers to Alexander v. Keane, 991 F. Supp. 329 (S.D.N.Y. 1998) for the position that "any procedural bar may be overcome by meeting the actual innocence test." Memorandum in Support of Petitioner's Opposition to Respondent's Motion to Dismiss Petition for Writ of Habeas Corpus [# 11, pp. 2-3]). But even that court indicated that one cannot simply sit on his or her rights and later, suggesting "actual innocence", and ignore the limitations imposed by Congress. To the contrary, the Alexander court observed, inter alia (Id. 991 F. Supp. at 337):

Any case in which a claim of actual innocence could not have been raised earlier would obviously meet the "cause" standard set out above (factual or legal basis not reasonably available). Cf. Triestman, 124 F.3d at 367-69 (prior to AEDPA, district courts would have been able to reach merits of claim that could not have been raised earlier but was now viable due to intervening change in law). Clearly, this does cover most actual innocence claims, because they are normally based on new evidence

that was either unavailable earlier or was omitted due to ineffective assistance of counsel.

That is surely not this case. To the extent that counsel for petitioner, in his Affidavit of Counsel (# 12), suggests that petitioner could make out a claim of actual innocence, it is based exclusively on materials (e.g., discovery materials, the transcript of the change of plea hearing) which were readily available since April of 1992. This is not a case in which petitioner contends that newly discovered evidence - that is, evidence which could not have been discovered in the exercise of due diligence - points to a showing of actual innocence.

[*11]

In this court's view, a contention by an attorney for a habeas petitioner that the petitioner could make out a claim of actual innocence, particularly where, as here, that claim of actual innocence was not made in the state courts, nor by petitioner in the petition filed in this court, does not, standing alone, excuse his failure to comply with the applicable statute of limitations set forth in Section 2244(d)(1). After all, if that was the case, any attorney could simply say that his or her client could make out a claim of actual innocence, rendering the congressionally mandated statute of limitations null and void for all practical purposes. Finally, even if one could accept the statement of counsel for the purpose of saying that petitioner could make out a claim of actual innocence, the affidavit in support of that comes up far short of the mark. In support of the position that petitioner could make out a claim of actual innocence, counsel for petitioner simply says that many of the witnesses who would have testified against him could have been impeached on the basis of prior inconsistent statements and/or deals with the prosecution. But that is the stuff of every criminal [*12] case - touching upon credibility - but hardly amounting to an assertion of "actual innocence." This is certainly not the extraordinary case contemplated by the Triestman v. United States, 124 F.3d 361, 378-79 (2d Cir. 1997); Wyzykowski v. Department of

Corrections, 226 F.3d 1213 (11th Cir. 2000); and Lucidore v. New York State Division of Parole, 209 F.3d 107 (2d Cir. 2000) courts warranting disregard of the congressionally mandated statute of limitations. This is simply a case where petitioner, for the first time after respondent filed his motion to dismiss, belatedly said that petitioner could make out a claim of actual innocence - a claim never clearly presented to the state courts.

For all of these reasons, this court finds and concludes that none of the exceptional tolling requested by petitioner is appropriate in the circumstances of this case. The petition filed in this court is clearly out of time within the meaning of Section 2244(d)(1). This court accordingly recommends n11 that the district judge to whom this case is assigned allow respondent's Motion to Dismiss Petition for Writ of Habeas Corpus (# 08).

n11 The parties are hereby advised that under the provisions of Rule 3(b) of the Rules for United States Magistrates in the United States District Court for the District of Massachusetts, any party who objects to these proposed findings and recommendations must file a written objection thereto with the Clerk of this Court within 10 days of the party's receipt of this Report and Recommendation. The written objections must specifically identify the portion of the proposed findings, recommendations, or report to which objection is made and the basis for such objections. The parties are further advised that the United States Court of Appeals for this Circuit has repeatedly indicated that failure to comply with this rule shall preclude further appellate review. See Keating v. Secretary of Health and Human Services, 848 F.2d 271 (1st Cir. 1988); United States v. Emiliano Valencia-Copete, 792 F.2d 4 (1st Cir. 1986); Park Motor Mart, Inc. v. Ford Motor Co., 616 F.2d 603 (1st Cir. 1980); United States v. Vega, 678 F.2d 376, 378-379 (1st Cir. 1982); Scott v. Schweiker, 702 F.2d 13, 14 (1st Cir. 1983); see also, Thomas v. Arn, 474 U.S. 140, 106 S. Ct. 466, 88 L. Ed. 2d 435 (1985).

[*13]

Lawrence P. Cohen

UNITED STATES MAGISTRATE JUDGE